Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

MARTIAL-BERTRAND NKOUNKOU,
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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64 pp

QUESTION PRESENTED

Whether the court of appeals should have remanded an immigration case for further proceedings after determining that the Board of Immigration Appeals ("BIA") committed error, instead of conducting a *de novo* review and determining, based on a legal theory and on facts that were not addressed by the BIA, that the petitioner was not eligible for asylum or withholding of removal.

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PETITION FOR A WRIT OF CERTIORARI

Martial-Bertrand Nkounkou ("Nkounkou") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The memorandum order of the court of appeals and Judge McKeown's dissent (App., *infra*, 1a-4a) are not published in the *Federal Reporter*, but are reprinted at 35 Fed. Appx. 680. The opinion of the Board of Immigration Appeals ("BIA") (App., *infra*, 5a-8a) and the decision of the immigration judge (App., *infra*, 9a-43a) are unreported. The court of appeals' order denying Nkounkou's Petition for Rehearing and Rehearing En Banc (App., *infra*, 44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2002. (App., *infra*, 1a). A petition for panel rehearing was denied, by a split panel, on October 30, 2002, and Nkounkou's Petition for Rehearing En Banc was denied simultaneously. (App., *infra*, 44a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and pertinent provisions of Title 8 of the Code of Federal Regulations, are reproduced in Appendix F to this petition (App., *infra*, 46a-53a).

STATEMENT OF THE CASE

This case is another in—what the Solicitor General has called—the "series of recent asylum and withholding-of-removal cases in which the Ninth Circuit has disregarded the fact-finding role assigned by statute, regulation, and this Court's decisions to immigration judges and the Board of Immigration Appeals." Pet. for Cert. in *INS v. Chen*, O.T. 2002, No. 25, at 12-13 (July 2002). Here, as in *Chen*, ___ U.S. ___ (Mem), 123 S. Ct. 549 (2002), *INS v. Ventura*, 537 U.S. ___, 123 S.Ct. 353, 355 (2002) (per curiam), and *INS v. Silvo-Jacinto*, ___ U.S. ___ (Mem), ___ S.Ct. ___, 71 USLW 3178 (Jan. 13, 2003), the Ninth Circuit determined that the BIA's opinion was in error. Rather than remand the case for resolution of the remaining factual and legal issues, however, the court of appeals resolved those issues itself.

Nkounkou is a citizen of the Republic of Congo. He is a member of the Lari ethnic group and was a close associate of Pascal Lissouba, the democratically-elected President of the Republic of Congo who was violently deposed. (App, *infra*, 1a, 19a-21a). On February 15, 2000, Immigration Judge Anna Ho (the "IJ") ruled that Nkounkou was not eligible for asylum, nor was he entitled to withholding of removal. (*Id.* at 34a-35a). The IJ reasoned that Nkounkou's testimony regarding past persecution and his well-founded fear of future persecution was not credible, in part because he was able to purchase an airline ticket from Hong Kong to Ecuador while living as a refugee in Hong Kong; and he used money obtained while in Hong Kong to flee to the United States rather than to evacuate his wife and daughter from Congo. (*Id.* at 38a-41a). *But see id.* at 31a (recounting testimony regarding Nkounkou's inability to contact his family due to the civil war in Congo).

Nkounkou timely appealed the IJ's decision to the BIA. On September 20, 2000, the BIA dismissed his appeal.

(*Id.* at 8a). It is undisputed that the BIA's decision rested solely on the IJ's adverse credibility determination. Nkounkou petitioned for review of the BIA's opinion before the United States Court of Appeals for the Ninth Circuit. On May 28, 2002, a split panel denied Nkounkou's petition. (*Id.* at 1a-4a). All three judges agreed that the BIA erred in resting its credibility determination on the two bases discussed above. (*Id.* at 1a-3a). Rather than remand the case, however, the court of appeals conducted a *de novo* review of the sufficiency of the evidence, focusing, in part, on facts that had not been addressed by the BIA or IJ. (*Id.* at 2a). Based on this *de novo* review of the record, the court of appeals concluded that "the BIA's ruling that Nkounkou did not demonstrate past persecution is nevertheless supported by substantial evidence." (*Id.*).

In dissent, Judge McKeown joined the majority's determination that the BIA had based its credibility ruling on impermissible grounds. (*Id.* at 3a). As a consequence, Judge McKeown concluded that "[a]t minimum, the petition should be granted because these two improper grounds are inextricably intertwined with the adverse credibility determination." (*Id.*). As to the remaining bases for the BIA's ruling, she noted that they rested on "mere speculation" and other impermissible grounds. (*Id.*). Judge McKeown also recounted the evidence in the record "from both the United States Department of State and Amnesty International, which demonstrat[ed] unmistakably that Laris and Lissouba supporters were singled out by the ruling militia for persecution." (*Id.* at 3a-4a).

Nkounkou timely filed a petition for rehearing and rehearing en banc, in which he explained that the Ninth Circuit had exceeded its authority by basing its decision on grounds other than those considered by the BIA. The court of appeals ordered the Attorney General to answer the petition. In his response, the Attorney General conceded that

the court of appeals had based its decision on facts not considered by the BIA. But in a reversal of the position announced in the Petitions for Writ of Certiorari in *Ventura*, *Chen*, and *Silva-Jacinto*, the Attorney General defended the Ninth Circuit's *de novo* review of the record in this case. In particular, his response brief said:

> Petitioner further argues that the case should be remanded because the panel decided it on "different grounds" from those set forth by the immigration judge. . . . The circumstance that the immigration judge focused on certain facts in the record whereas the panel focused on others to reach the same result is not a problem.

Respondent's Response and Opposition to Petitioner's Suggestion for Rehearing en Banc at 11 (Oct. 2, 2002). On October 30, 2002, the court, by split decision, denied the petition for panel rehearing, and it denied the petition for rehearing en banc. (App., *infra*, 44a). Nkounkou filed a motion to reconsider in light of this Court's intervening opinion in *Ventura*, but that motion was denied. (*Id.* at 45a).

REASONS FOR GRANTING THE WRIT

Ventura compels the grant of the writ in this case. This case, like *Ventura*, is another in the series of decisions where the Ninth Circuit overstepped its constitutionally prescribed authority by resolving issues not addressed by the BIA. 537 U.S. ___, 123 S.Ct. at 355 (per curiam) (referencing at least nine other related decisions). Thus, as with other recent cases that exhibit the same error, this Court should grant Nkounkou's petition for Writ of Certiorari, reverse the judgment of the Court of Appeals for the Ninth Circuit, and remand the case in light of this Court's decision in *Ventura*.

In *Ventura*, this Court reaffirmed the principle, grounded in separation of powers, that when the law entrusts an agency to be the primary decision maker, courts cannot make those decisions in the first instance. *Id.* That principle was violated by the Ninth Circuit in this case. Here, as in *Ventura*, only one issue was properly before the court of appeals for review: Whether the BIA's determination of Nkounkou's credibility was in error. As the Attorney General pointed out in its briefing on the merits for this case:

> [T]he Board did not render a determination on the sufficiency of Mr. Nkounkou's evidence in the event it were true. The issue is not, therefore, open for review. Should this Court conclude that the evidence compels a finding that Mr. Nkounkou was credible ... the case should be remanded to the Board for further findings on the merits of his claim.

Brief for Respondent at 19 n.9 (Mar. 2, 2001). The panel found that two key facts used by the BIA to support its adverse credibility determination should have been disregarded as impermissibly considered. (App., *infra*, 1a-2a, 3a). Having determined that the BIA erred in regard to the only issue open for review, the case should have been remanded as suggested by the Attorney General. The court of appeals committed its own error by further reviewing the record to determine whether the BIA's factual conclusions could be sustained. The Ninth Circuit, in short, proceeded to address an alternative theory not addressed by the BIA. Doing so constituted a *de novo* review of the record. That *de novo* review ultimately resulted in a decision on facts not addressed by the BIA or the IJ. *Compare* (App., *infra*, 2a) (discussing the basis for the court of appeals' decision), *with* (App., *infra*, 6a-8a, 35a-41a) (recounting the BIA's and the IJ's reasoning). As *Ventura* makes clear, the only option open to the court of appeals once it had determined the BIA had erred in consideration of the evidence was to remand the

case to the BIA for further analysis. 537 U.S. at ___, 123 S. Ct. at 355-56. Any further review was error.

A similar course of action was held to be impermissible by this Court in *Ventura*. In *Ventura*, a Ninth Circuit panel granted Ventura's petition for review on grounds that had been addressed to the IJ but had not been considered by the BIA. 537 U.S. at ___, 123 S. Ct. at 354. In reversing the court of appeals, this Court explained that when the BIA has not reached an issue, a court of appeals "exceed[s] its legal authority" when it decides that issue rather than remanding the case to the BIA. *Id.* In so holding, this Court emphasized that a court of appeals' role is to *review* the decision of the BIA, not usurp its decision-making authority. *Id.* at 355 (citing *Castillo v. INS*, 951 F.2d 1117, 1120-1121 (9th Cir. 1991)). Moreover, the Court's opinion reiterated the well-established rule of administrative law that "a 'judicial judgment cannot be made to do service for an administrative judgment.'" *Id.* at 355 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). Thus, when the court of appeals essays to weigh factors other than those upon which the administrative agency based its judgment, "'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Id.* (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

Under the rule announced in *Ventura*, the Ninth Circuit's finding that the IJ's decision is supported by substantial evidence despite the error of the BIA is an impermissible exercise of judicial authority. As *Ventura* plainly states—and contrary to the Attorney General's argument on rehearing—a court of appeals may not conduct a *de novo* review in support of a BIA administrative determination. 537 U.S. at ___, 123 S. Ct. at 355 ("[J]udicial judgment cannot be made to do service for an administrative judgment. . . . A court of appeals is not generally empowered

to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." (internal quotations and citations omitted)). The court of appeals exceeded the scope of its review by resolving legal and factual issues not addressed by the BIA. Having determined that the BIA based its decision on impermissible and insufficient grounds, the proper remedy was remand to the BIA so that the BIA, and not the court of appeals, may make any such determination in the first instance. *Ventura*, 537 U.S. at ___, 123 S.Ct. at 356.

CONCLUSION

This Court should grant Nkounkou's petition for Writ of Certiorari, reverse the judgment of the Court of Appeals for the Ninth Circuit, and remand the case for further consideration in light of this Court's decision in *Ventura*.

Respectfully submitted,

PAUL J. LAWRENCE
Counsel of Record

HON. SLADE GORTON
THEODORE J. ANGELIS
MICHAEL K. RYAN
Attorneys

JANUARY 2003.

Appendix A

United States Court of Appeals,
Ninth Circuit.

Martial Bertrand NKOUNKOU, Petitioner,
v.
IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

No. 00-71327.
I & NS No. A76-598-579.

Argued and Submitted May 6, 2002.
Decided May 28, 2002.

On Petition for Review of an Order of the Board of Immigration Appeals.

Before RYMER, McKEOWN and GOULD, Circuit Judges.

MEMORANDUM*

Martial-Bertrand Nkounkou ("Nkounkou"), a citizen of the Republic of Congo, petitions for review of the Board of Immigration Appeals' ("BIA") decision affirming the Immigration Judge's denial of Nkounkou's requests for asylum and withholding of deportation. We deny Nkounkou's petition for review.

Disregarding how Nkounkou bought his airplane ticket to this country and why he stayed for a year in Hong Kong, see Akinmade v. INS, 196 F.3d 951, 956 (9th

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Cir.1999), the BIA's ruling that Nkounkou did not demonstrate past persecution or a well-founded fear of persecution is nevertheless supported by substantial evidence. See INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). Nkounkou lived safely in the outskirts of Brazzaville during the height of civil unrest and was able to travel in and out of the country. Although he submits this was because he was under a Colonel's protection, the BIA was not compelled to accept his explanation as it was wholly unsubstantiated. Nkounkou never received a death threat or heard from others that Sassou-Nguesso's militia had targeted him. While his house was destroyed, it was after his family abandoned it and nothing shows that the destruction was aimed at him because he was a Lari or a Lissouba supporter. Finally, even though the record reveals that civil war in the Republic of Congo was rampant, Nkounkou did not demonstrate that Laris or Lissouba supporters were singled out as such.

Because the evidence does not compel a finding of persecution or a well-founded fear thereof, it necessarily does not compel a finding that Nkounkou is entitled to withholding of deportation. Singh v. INS, 134 F.3d 962, 971 (9th Cir. 1998).

PETITION DENIED.

McKEOWN, Circuit Judge, dissenting.

I respectfully dissent. The IJ's denial of asylum to Martial Bertrand Nkounkou, who is a member of the Lari ethnic group and a close associate of Pascal Lissouba, the former President of the Republic of Congo ("Congo"), is predicated on an adverse credibility finding that cannot be sustained by the administrative record.

The credibility findings address five different matters. As the majority appears to acknowledge, two of these--

related to Nkounkou's conduct in Hong Kong--are inappropriate grounds for an adverse credibility finding. See Akinmade v. INS, 196 F.3d 951, 956 (9th Cir. 1999). (At a minimum, the petition should be granted because these two improper grounds are inextricably intertwined with the adverse credibility determination.) Two additional findings relating to Nkounkou's relocation to the outskirts of Brazzaville and his various excursions across the border to the city of Kinshasa rest on mere speculation by the IJ as opposed to specific and cogent reasons supported by the record. See Mosa v. Rogers, 89 F.3d 601, 604-05 (9th Cir. 1996). Finally, Nkounkou explained to the IJ that he could not reveal the proper name of his protector, The Colonel, because doing so would be counter to his cultural practices. The IJ restricted him from providing further corroborative testimony and explanation, substituted her own view as to what she would have done, and impermissibly declined to credit his culturally-based refusal. See Chouchkov v. INS, 220 F.3d 1077, 1083 n.15 (9th Cir. 2000).

The IJ's conclusion that Nkounkou does not possess a well founded fear of future persecution is contrary to both the administrative record and INS regulations. As an ethnic Lari and a Lissouba supporter, Nkounkou is not required to demonstrate that he was specifically targeted for persecution; rather, he qualifies for asylum if he can establish that "there is a pattern or practice . . . of persecution of a group of persons similarly situated to [him] on account of race . . . membership in a particular social group, or political opinion." 8 C.F.R. § 208.13(b)(2)(iii)(A). The administrative record, including country condition reports from both the United States Department of State and Amnesty International, demonstrates unmistakably that Laris and Lissouba supporters were singled out by the ruling militia for persecution and thus faced dangers more severe than those faced by other Congo citizens.

Because the IJ's findings were not supported by substantial evidence, I would grant the petition for review.

Appendix B

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A76 598 579 – Seattle Date: Sep 20, 2000

In re: MARTIAL-BERTRAND NKOUNKOU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Myriam Jaidi, Esquire[1]

ON BEHALF OF SERVICE: Robert F. Peck
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - No valid immigrant visa

APPLICATION: Asylum; withholding of removal; protection under Article 3 of the Convention Against Torture

In a decision dated February 15, 2000, an immigration Judge found the respondent subject to removal as charged, denied his applications for asylum and withholding of

[1] A copy of this decision has also been mailed to Stacey Crawshaw-Lewis, Preston Gates and Ellis, LLP, 701 Fifth Avenue, Suite 5000 Seattle, WA 98104-7078, who filed a Notice of Entry of Appearance as Attorney on August 15, 2000.

removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3) (Supp. IV 1998), and denied his request for withholding of removal pursuant to Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture"). The respondent filed a timely appeal. The appeal will be dismissed.

We have reviewed the record of proceedings, the Immigration Judge's decision, and the respondent's contentions on appeal. We conclude that the Immigration Judge, in a thorough and well-reasoned decision, properly evaluated the facts presented by the respondent in support of his asylum claim and correctly concluded that he failed to establish either past persecution or a well-founded fear of persecution in the Republic of Congo on account of a ground enumerated in the Act. *See Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996); 8 C.F.R. § 208.13 (2000).

We note that the Immigration Judge based her decision, in part, on her conclusion that the respondent was not a credible witness. *See* I.J. at 26. The Board ordinarily will not disturb an Immigration Judge's finding concerning the credibility of a witness, because the Immigration Judge has the advantage of observing the alien as he or she testifies. *See, e.g., Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998); *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994); *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985), *aff'd*, 825 F.2d 1188 (7th Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). We find that the Immigration Judge here had ample reasons to support her adverse credibility determination, and we note that she provided a thorough recitation of the numerous inconsistencies in the respondent's testimony, the lack of evidence

and absence of detail to support his account of events, and the inherent improbability of various elements of his claim. *See* I.J. at 26-32.

With respect to the respondent's asserted fear that he would be tortured if he were returned to the Republic of Congo, we note that on February 19, 1999, interim regulations implementing the Convention Against Torture were published in the Federal Register, effective March 22, 1999. *See* 8 C.F.R. §§ 208.16-208.18 (2000). The regulations establish procedures for raising a claim for protection under Article 3 of the Convention Against Torture, which prohibits refoulement of an alien to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. *See id.*; Convention Against Torture, art. 3. In particular, the regulations set forth the eligibility requirements for withholding of removal under the Convention Against Torture, which include establishing that it is more likely than not that the alien would be tortured if removed to the country of removal. *See* 8 C.F.R. § 208.16(c)(2).

Upon consideration, we agree with the Immigration Judge, for the reasons set forth in her decision, that the respondent has failed to meet his burden of proving eligibility for withholding of removal under the Convention Against Torture. *See* I.J. at 33; 8 C.F.R. § 208.16(c). The evidence presented does not establish that the respondent is more likely than not to be tortured by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity in the Republic of Congo. *See* 8 C.F.R. §§ 208.16(c)(4), 208.18(a)(1).

Because the Immigration Judge correctly found that the respondent failed to establish either a well-founded fear or a clear probability of persecution, and failed also to demonstrate that it is more likely than not that he would be

tortured if returned to the Republic of Congo, we will uphold her decision for the reasons set forth therein. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

\s\John Gwendelsberg
FOR THE BOARD

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Seattle, Washington

File No. A76 598 579 Date: Feb. 15, 2000

In the Matter of)
)
Martial-Bertrand)
NKOUNKOU) IN REMOVAL
) PROCEEDINGS
)
Respondent)

CHARGE: Section 212(a)(7)(A)(i)(1) of the Immigration and Nationality Act (Act), as amended, in that you are a ineligible for admission to the United States because at the time of the your entry you were not in possession of a valid, unexpired immigrant visa, reentry permit, border crossing card or other valid entry document required by the Act.

APPLICATION: Asylum, Withholding of Removal, Convention Against Torture

ON BEHALF OF RESPONDENT:

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ON BEHALF OF SERVICE:

Dana Laverty
Assistant District Counsel
1000 Second Ave., #2900
Seattle, WA 98104

DECISION OF IMMIGRATION JUDGE

The respondent is a native and citizen of the Republic of Congo. He arrived in the United States at Anchorage, Alaska on October 30, 1999 without valid entry documents. A Notice to Appear (Exhibit 1) issued on November 10, 1999, and the respondent was placed in removal proceedings. The respondent filed an Application for Asylum and Withholding of Removal (I-589) (Exhibit 2). The case was set on this Court's merits calendar for January 6, 2000, and the Court heard further testimony on January 19, 2000. The respondent filed a Prehearing Statement and Supplemental Declaration of Respondent (Exhibit 2B) on January 6, 2000. The Service also submitted its Prehearing Statement on January 6, 2000 (Exhibit 4). The respondent was given notice of the consequences for filing a frivolous I-589 (Exhibit 5). The U.S. Department of State country report for the Republic of Congo is marked Exhibit 3A.[2] The respondent submitted maps of the Congo (Exhibit 2D) as well as a Second Supplemental Declaration (Exhibit 2E).

II. Statement of the Law

Statutory Requirements for Asylum

Section 208(a) of the Immigration and Nationality Act authorizes a discretionary grant of asylum to an alien who is a 'refugee.' 8 U.S.C. § 1158(a). As defined in the Act, a refugee is an alien who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion,

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[2] The U.S. Department of State country profile for the Democratic Republic of Congo is marked Exhibit 3. However, the Democratic Republic of Congo (the former Zaire) is a separate and wholly distinct nation from Respondent's home country, the Republic of Congo. The country report concerning the Democratic Republic of Congo was therefore not considered in these proceedings.

nationality, membership in a particular social group or political opinion." INA § 101 (a)(42); see also I.N.S. v. Cardoza-Fonseca, 408 U.S. 421 (1987); Matter of Maldonado-Cruz, 19 I&N Dec. 509 (BIA 1988); Matter of A-G, 19 I&N Dec. 502 (BIA 1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

To establish eligibility for asylum based on a well-founded fear of persecution, an alien must demonstrate that his fear is both subjectively and objectively reasonable. Estrada-Posadas v. I.N.S., 924 F.2d 916, 918 (9th Cir. 1991). A respondent's "credible testimony that he genuinely fears persecution" satisfies the subjective component. Acewicz v. I.N.S., 984 F.2d 1056, 1061 (9th Cir. 1993). The objective component "requires a showing by credible, direct and specific evidence in the record of facts that would support a reasonable fear that the petitioner faces persecution." Id. The respondent bears the burden of establishing eligibility for asylum. Estrada-Posadas, 924 F.2d at 918.

Evidence of state action is not necessarily required in order to establish persecution, or a well-founded fear thereof, where the government is unable or unwilling to control the acts of private groups. See Arteaga v. I.N.S., 836 F.2d 1227, 1231 (9th Cir. 1988). In order to establish a 'well-founded fear' of persecution, an alien must show: 1) that he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; 2) that the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; 3) that the persecutor has the capability of punishing the alien; and 4) that the persecutor has the inclination to punish the alien. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

The United States Supreme Court has held that the well-founded fear standard requires a showing that the fear of

persecution is biased on a "reasonable possibility" that such harm will occur. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987); I.N.S. v. Stevic, 467 U.S. 407, 424-25 (1984); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). This standard is more generous than the clear probability standard applicable to withholding of removal. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

In certain circumstances past persecution alone might warrant a grant of asylum even if there is little likelihood of present persecution. As example is where the past persecution was so severe that return to the country of persecution would be inhumane. Matter of Chen, 20 I&N Dec. 16 (BIA 1989). Even if the respondent had demonstrated past persecution, or that at the time he left and for some time thereafter he had a well-founded fear of persecution should he return, there must be a compelling or humanitarian basis that warrants a grant of asylum.

Statutory Requirements for Withholding of Removal

In order to establish eligibility for withholding of removal, the respondent must show that his life or freedom would be threatened in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3). This statutory provision requires that the respondent demonstrate a "clear probability of persecution" on account of one of the five enumerated grounds in the Act. I.N.S. v. Stevic, 467 U.S. 407 (1984). This 'clear probability' standard requires a showing that "it is more likely than not" that the alien would be subject to persecution. The standard for withholding of removal is more stringent then that of asylum. Id. at 429-30.

Under the Refugee Act of 1980, withholding of removal is mandatory. A grant of political asylum, on the

other hand, can be denied in the exercise of discretion even if the alien establishes statutory eligibility. Cardoza-Fonseca, 480 U.S. at 439, 445 (1987).

Statutory Requirements for Convention Against Torture

The Torture Convention was signed by the United States on October 18, 1988, and the Senate adopted its resolution of advice and consent to ratification on October 27, 1990. The treaty became effectively binding on the United States on November 20, 1994. Article 3 of the Convention provides:

1. No State shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subject to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The Attorney General signed the Interim Regulations implementing the UN Convention Against Torture on February 19, 1999. The interim regulations create a new type of claim which an alien may raise in removal proceedings, which is distinct from asylum and withholding of removal under section 241(b)(3) of the Act.

a. Definition of Torture

The interim regulation provides that the following elements must exist to constitute torture: It must be an extreme form of cruel and inhuman treatment, which causes and is intended to cause pain and suffering, but does not include "lawful sanctions," including the death penalty. The

victim of the torture must be in the custody or physical control of the perpetrator and the torture must be inflicted at the instigation of a public official or with the consent or acquiescence of a public official or other persons acting in an official capacity. 8 CFR § 208.18.

Section 208.18(a)(1) contains the first sentence of Article 1, providing the basic contours of the definition of torture. It does not attempt to list the types of acts that would constitute torture, but rather expresses basic elements that must be present in order for an act to be torture: It must be an act causing severe pain or suffering, whether physical or mental, intentionally inflicted on a person. Article 16, which refers to "other acts of cruel, inhuman or degrading treatment or punishment, which do not amount to torture," confirms that, as provided in section 208.18(a)(2), torture is an extreme form of cruel and inhuman treatment. See, e.g., S. Treaty Doc. No. 100-20 at 23.

Section 208.18(a)(3) provides that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." This section further provides that "[l]awful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture." The definition of torture can, in limited circumstances, include severe mental pain and suffering. Section 208.18(a)(4) provides a detailed and restrictive definition of the type of severe mental harm that can constitute torture.

Section 208.18(a)(5) requires that, in order to qualify as torture, an act must be specifically intended to inflict severe pain or suffering. Thus, an act that results in unanticipated or unintended severity of pain and suffering is not torture. See, e.g., S. Treaty Doc. No. 100-20, at 19.

Article 1 of the Convention Against Torture requires that torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." 136 Cong. Rec. 36198. Section 208.18(a)(7) mirrors this requirement. Thus, the definition of torture includes only those acts that occur in the context of governmental authority. See, e.g., S. Treaty Doc. No. 100-20, at 19.

Section 208.18(a)(8) provides that noncompliance with applicable legal procedural standards do not per se constitute torture.

b. Torture Convention Withholding

The United States currently implements Article 33 of the Refugee Convention through the withholding of removal provision in section 241(b)(3) (formerly section 243(h)) of the Immigration and Nationality Act (INA). That provision, as interpreted by the courts, requires the Attorney General to withhold an alien's removal to a country where it is more likely than not that the alien's life or freedom would be threatened on account of race, religion, nationality, membership of a particular group or political opinion. See INS v. Stevic, 467 U.S. 407, 429-30 (1984).

However, there are some important differences between withholding of removal under section 241(b)(3) of the Act and Article 3 of the Convention Against Torture. First, several categories of individuals, including persons who assisted in Nazi persecution or engaged in genocide, persons who have persecuted others, persons who have been convicted of particularly serious crimes, persons who are

believed to have committed serious non-political crimes before arriving in the United States, and persons who pose a danger to the security of the United States, are ineligible for withholding of removal. See INA section 241(b)(3)(B). Article 3 of the Convention Against Torture does not exclude such persons from its scope. Second, section 241(b)(3) applies only to aliens whose life or freedom would be threatened on account of race, religion, nationality, and membership in a particular social group or political opinion. Article 3 covers persons who fear torture that may not be motivated by one of those grounds. Third, the definition of torture does not encompass all types of harm that might qualify as a threat to life or freedom. Thus, the coverage of Article 3 is different from that of section 241(b)(3): Broader in some ways and narrower in others.

The interim regulation provides that an Immigration Judge may consider an application for withholding of removal under the Torture Convention if the alien is ineligible for asylum. Under section 208.16(c), withholding of removal may be granted to aliens who are not barred from eligibility under section 241(b)(3)(B) of the Act.

In considering the application, the Immigration Judge must determine whether the alien has established that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The "more likely than not" standard is the same standard as withholding of removal under section 241 (b)(3) of the Act.

If an Immigration Judge decides that the alien has met his burden of proof and the alien is not subject to the bars contained in section 241(b)(3) of the Act, the Immigration Judge will grant the alien withholding of removal. A grant of withholding of removal under the Torture Convention has the same consequences as a grant of withholding of removal under section 241(b)(3) of the Act, i.e. the alien may not be

removed to a country where it is more likely than not that he or she would be tortured.

Section 208.16(c)(3) directs that all evidence relevant to the possibility of future torture should be considered when making the determination as to whether the alien is more likely than not to be tortured. It specifically provides that evidence of past torture inflicted on the respondent should be considered, because evidence of past torture may be probative as to whether future torture is likely.

Section 208.16(c)(3) also requires that; in determining whether the respondent has met his or her burden of proof, the decision maker may consider any evidence that the alien may be able to relocate to an area of the country of removal where he or she is not likely to be tortured. Consideration of this factor is consistent with long-established precedent in the context of the adjudication of requests for asylum and withholding of removal under section 241(b)(3)of the Act, and is relevant to the likelihood that an alien would be tortured if returned to a specific country.

Where applicable, the adjudicator will consider evidence of gross, flagrant, or mass violations of human rights committed within the country in question. The words, "where applicable" indicate that, in each case, the adjudicator will determine whether and to what extent evidence of human rights violations in a given country is in fact a relevant factor in the case at hand.

Burden of Proof and Credibility

The burden of proof is on the applicant for asylum to establish that he is a refugee as defined in Section 101(a)(42) of the Act. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); *modified on other grounds*; Matter of Mogharrabi, 19

I&N Dec. 439 (BIA 1987); 8 C.F.R. §§ 208.13, 242.17(c)(4)(iii).

In some cases, the only available evidence on the alien's subjective fears may be the alien's own testimony. It can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the alien's fear. Matter of Mogharrabi, 19 I&N Dec. 439 at 445 (BIA 1987). In Matter of Dass, 20 I&N Dec. 120 (BIA 1989), the Board held that as an asylum applicant bears the evidentiary burden of proof and persuasion, where there are significant, meaningful evidentiary gaps, applications for political asylum will ordinarily be denied for failure of proof. Id.

An asylum applicant bears the burden of persuading the IJ that his evidence is credible. Mejia-Paiz v. INS, 111 F.3d 720, 722 (9th Cir. 1997). Adverse credibility determinations are appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony. See generally Artiga-Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987); Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986) (regarding discrediting factors); Matter of B-, Interim Decision 3251 (BIA 1995). Identified discrepancies that are not minor but instead "relate to the basis for (the) alleged fear of persecution", support an adverse credibility finding. De Leon-Barrios v. INS, 116 F.3d 391, 393-94 (9th Cir. 1997). However, adverse credibility findings must be supported by specific, cogent reasons, and the reasons set forth must be substantial and bear a legitimate nexus to the finding. Akinmade v. INS, 196 F.3d 951, 954 (9th Cir. 1999).

At the merits hearing held on January 6, 2000 the respondent testified as follows:

TESTIMONY OF MARTIAL-BERTRAND NKOUNKOU

He was born on August 31, 1971 in Brazzaville, Congo. He is married to Bibi Benedicte Perpetue Damba Matongo and has a daughter, Benedicte-Debertrand Nephertiti Nkounkou. He is Lari.

He became politically active in around April or May, 1993 when he joined the UPADS. He was in his third year at the university. He signed his membership into the organization during a meeting that was taking place at that time. As a member of the organization, he had to go to Jata, a type of neighborhood, for meetings for the party. He became the president of the UPADS in Sangolo-Mos, which was the neighborhood where he lived. His main role as president of the subsection was to bring members to join the UPADS. The members in Sangolo were to stay there and he spoke to them about the party. He was a member of the party from 1993 until the civil war in 1997. Lissouba became president of the republic in August 1992.

In Congo there are three main parties. UPADS has Cocoyes, its own private militia. MCDDI (Movement Congolese Pourle-Democracie et le Development Integral) has its own militia, the Ninjia. The third Party, PCT, Congolese Party for Labor, has a militia, the Cobras. He has never been a member of any militia group.

In February 1995 he was the head accountant for Sosa World Trading, the Lissouba family's business organization. In July 1996 he was transferred to the Hotel Olympic Palace, where he was the head director of the financial department. The Hotel Olympic Palace also belonged to the Lissouba family.

The first democratic election was in 1992, when President Lissouba was elected. In June 1997, the civil war

in Brazzaville began. The war was the UPADS, led by Lissouba, against the PCT, led by Sassou-Nguesso. Sassou-Nguesso was the president of the PCT and president of the republic from 1979 to 1992. During this time, the country was under one party rule and there were no elections.

Lissouba's goal was to stop Sassou-Nguesso from organizing a coup d'etat when the war broke out in 1997. Sassou-Nguesso's militia fought against the government's militia. In October (1997), President Lissouba fled. Sassou-Nguesso proclaimed himself president of the republic and canceled the constitution and the parliament.

Between June and August of 1997, he was the head financial director for the Hotel Olympic Palace. He was the person responsible for managing the financial aspect of the corporation. As the war gradually intensified, different governments came to take out their own nationals. Foreigners were evacuated from Brazzaville, including Hilairet, the manager of the hotel. The French army was there and the soldiers took the French citizens to Libreville in Gabon.

He was responsible for managing the hotel. Since he was responsible for managing the hotel, he had to go to the president of the republic's office to present a summary of everything done daily. To go from his house to that office there were many military barriers. The president of the republic, Lissouba, even gave him two body guards. President Lissouba's son, Jean Luc Mabondzot, was the boss of Sosa World Trading and is the one who directly gave him the bodyguards. (In his culture, when a person is raised by another individual, his guardian is called the father. Jean Luc Mabondzot is not the biological son of the President Lissouba. Jean Luc Mabondzot is the son of Madame Lissouba, the second wife of President Lissouba.)

He left Brazzaville in September or October of 1997, because Sassou-Nguesso's militia began taking over the area where he was living. Security was increased and so "we" had to leave the area. "We" included himself, his wife, daughter, mother, sister and nephew. They took the last truck Mbambou. They walked to his father's village, Mayamou.

They stayed there until they heard the sound of a car. The village is located in the forest, it was easy for them to hear the sound of a car. Their first instinct was to flee, because cars were no longer going around at that time. They fled into the forest.

When the men arrived at the village, they ransacked the whole village. When they returned, they asked the aged, who could not flee, who the men were. The aged said that the men spoke Lari and were armed, so they understood they were Ninjas. They stayed there and a little later heard the sound of another car. They again fled. They raped two girls and took one boy. The elders said these people spoke Lingala, a language that is spoken by the citizens in the north of the country. Since they were armed, they understood that they were Cobras.

They were completely filled with fear and decided to flee to his mother's village, Nganga Kombo. The village is rather far away with no car access. They stayed there until the survival conditions worsened. They had no more food and malaria was hitting there very strong. There were serpents bothering them and the children began to get sick. His daughter had diarrhea which worried them. They knew they had to get out of there. Also, they heard news that Sassou-Nguesso had taken over the presidency and was asking people to leave again. In light of his old position in the UPADS, as well as his employment with Hotel Olympic Palace and the fact that he was young and a Lari, caused the fear in him to rise.

He, his wife and mother, came up with an idea. They sent Ya Martine, his older sister, with a letter to meet the Colonel. The Colonel was one of his uncles who worked as a colonel under Sassou-Nguesso, in the Cobras. (An uncle is a person he considered to be like a godfather.) He contacted the Colonel for his own safety; the Colonel would be able to make sure that he was secure in Brazza, because he was a Colonel in Sassou's army.

His wife, himself, daughter, sister, mother and nephew went to the village of Nguela to meet the Colonel. The Colonel took him, his wife, his daughter and his nephew to Kimpuomo. His mother and older sister, Ya Martine, remained in Nguela because the truck was not large enough for all of them.

Kimpuomo is located outside of Brazzaville. There is only one way to go from Kimpuomo to Brazzaville. He stayed with his wife, daughter and nephew in Kimpuomo at another sister's (Ya Ida's) unfinished house. When he was in Kimpuomo, the Colonel visited him from time to time. The Colonel told him that his uncle Matsiona had been killed. (An uncle, or "tonton", is a person considered as your father. The Colonel and uncle Matsiona are not the same person.) In his culture, when he promises something, he can not reveal it. The Colonel saved his life. The Colonel is deceased, and he can not betray his memory. He promised the Colonel that he would not reveal his name. He can only say that he was a Colonel for Sassou-Nguesso's army. The Colonel is from the North. He met the Colonel when he was in his second or third year at the Institute. The Colonel was one of his colleague's uncle.

He left Brazzaville to go to Hong Kong because at one moment in time the war picked up again. He thinks that this was around August 1997. The confrontations were starting up again. At that time he asked the Colonel about the

situation, but the Colonel told him not to worry about it because it was only a small situation that would take care of itself. The situation deteriorated. Since he was at Kinshasa and he was going back and forth with the Colonel to Kinshasa, in Zaire.

Matsiona was his "tonton". He met Matsiona when he was at the Superior Institute of Management. Matsiona was his business law professor. They became closer and Matsiona gave him suggestions about politics. Uncle Matsiona was killed, according to the Colonel. The Colonel told him that the Cobras killed Uncle Matsiona. He read a report on this on the Internet in Hong Kong. He does not remember it too well, but it was from a Cuban rights organization. Exhibit 2B, Tab 3, Page 2 of 3, provides evidence of this death.

Three people were killed in the hotel before he left for the village, including the head baker, a guy who cleaned the pools, and a receptionist. The receptionist was from the North. They killed him because they assumed he was allied to Lissouba because he was from the North and because he worked at the hotel. That was the news he received at the hotel. Another one was killed by the barricades. These individuals worked in the hotel and were killed because they were affiliated with the hotel. The Colonel told him that another person, Mberi, was killed. Mberi was the President of sub-section of UPADS in M'Pissa, a type of neighborhood in BaCongo. BaCongo is a District in the southern part of Brazzaville.

Martin Mberi was a member of the UPADS, Minister for Centralization and Administrative Reform. Tonton Mberi is different from Martin Mberi. Tonton Mberi was killed, according to what the Colonel told him. The death of Matsiona and Mberi hurt him. Especially Tonton Matsiona, because they met even before he fled to the village. Matsiona

told him that he (Respondent) had to leave. Matsiona said that if these people, the Cobras, continued ahead, he (Respondent) must leave due to his position. He (Respondent) told Tonton Matsiona that Matsiona was in the same position. But Tonton Matsiona said he was not concerned because he (Matsiona) was a member of the UDR, Union for Democracy for the Republic, and he would not have the same problem. The president of this party, Andre Milongo, had a good relationship with Sassou-Nguesso. Because Matsiona was a member of the UDR he felt secure. He (Respondent) told Matsiona, "You were one of Lissouba's ministers," but Matsiona was not worried. When Matsiona was killed, he (Respondent) was very hurt. He asked himself what would have happened to him if he had not fled. The Colonel told him that they burned his house, because he was close to Lissouba. All of those who were close to Lissouba had to undergo such damage.

He was going back and forth to Kinshasa with the Colonel. He did this because when he came back to Brazzaville from the village (Nganga Kombo), the Colonel said to him, "Little one, I'm going to negotiate for you." From that time until February 1998, he went with the Colonel to Kinshasa, because the Colonel said it was going to help him earn some points from them for amnesty. He went to Hong Kong in November of 1998.

The Colonel always took his passport and his national identification card when they went to Kinshasa. The Colonel would always drop him off at the Estoril Hotel with the bodyguard. During the last trips, he was surprised that the Colonel presented him to some Ninja. The Colonel wanted the Ninja to see that Sassou did not kill all the people of Brazzaville. The Colonel introduced him to the Ninja and told the Ninja that he (Respondent) was the president of subsection of UPADS. The Colonel was trying to show that he was a close friend and also that he was with Lissouba and

that they did not kill people in Brazzaville. The people should not fear going to Brazzaville.

They entered Brazzaville. He did not understand this. Later on, when he got his passport, all of his entry and departures were shown. The Colonel showed all of his entries into Brazzaville. The Colonel presented his passport to the authorities in Brazzaville. He found this bizarre, since he did not need a passport to Kinshasa.

He did not ask the Colonel what he was doing because he said, "Little one, I'm going to negotiate for you." The Colonel is a "tonton," and a military man who just came back from war. There were abnormal reactions. In his culture, to be curious means suspicion. That would have meant that he did not believe in the Colonel. Therefore, he had to remain reserved and not ask any questions. He was afraid his tonton, the Colonel, would suspect him of suspecting the Colonel. He was with the Colonel when he was accepted to enter (Brazzaville). When he saw his passport, he felt the Colonel used him. He had concerns about that because a second rebellion (by the Ninja's) took place in August of 1998.

He left for Hong Kong, because when he came back to Brazzaville in August, the war intensified. He was supposed to serve as a type of bridge between the exiles of those who fled and the new rebellion. The Colonel told him that his name was circulating within the Cobras, because they, Lissouba and Kolelas, the President of MCDDI, (a political party whose militia are the Ninjas) thought he was a bridge between those in exile and the Ninjas who were in the process of causing the rebellion.

He left Brazzaville for Hong Kong in November 1998, because they were supposing that he was acting as a bridge and because he was the financial director of Hotel

Olympic belonging to Lissouba family, and he was the president of the subsection of UPADS. If he returned to Brazzaville, he will be tortured and killed because of the reasons that made him flee. Now, he is going to be leaving from the United States to his country, and the United States and his country are in conflict because the United States is considered to be allied with Bernard Kolelas and Lissouba. Kolelas also found asylum in the United States. It would be difficult for him to prove that he did not have contact with Bernard Kolelas. This is especially true since he is Lari, from the same region as Bernard Kolelas.

On cross-examination, he testified as follows:

He had no problems in school as a result of his political activities. He graduated with bachelor's degree of art, finance and accounting. He completed his studies without having to repeat any classes. Not everyone gets to go to college in the Congo. Only those with a baccalaureate can go to college.

When he was at the Hotel Olympic Palace he had no responsibilities for Lissouba party funds. He was only responsible for the funds in the hotel.

The fighting broke out in June 1997 when he was working at the hotel. He took over the role of manager of the hotel only when Mr. Hilairet was evacuated, between the end of June or July 1997. He left his employment at the hotel in August or September 1997 when he fled from Brazzaville to the village. Between June and the time he left, the Cobra forces had not yet arrived. But three hotel employees were killed who were lower level employees than himself.

He was able to go to and from the Hotel daily from his home in the southern part of Brazzaville. Lissouba was in control of southern part and the Cobras controlled the

northern part. The agents who died were coming from Poto Poto, the north, more in the center part of Brazzaville. He escaped without harm, even though the other three employees were killed, because he lived in the south. He had to go through the hospital, in the university district, to get to the hotel. He was never detained or interrogated by the Cobra forces. This part was controlled by Lissouba's militia.

During this time, Lissouba's militia were also committing pillaging of other places. It is a war between the militias and they kill each other and of course civilians are hurt. He thinks Lissouba's forces also killed people due to their ethnicity. It was a war of savages.

When he went to Zaire with the Colonel, the border guards in Congo were part of Sassou-Nguesso's supporters. Sassou had already become president. Everything became a single party system. It is difficult to distinguish between the true Cobras and the Republican Army. He went to and returned from Zaire several times. He can not recall if it was more than ten times. The officials at the border were military men working for the new government of Sassou.

Those people could have done him harm. That is why he traveled with the Colonel. These people were looking for members of Lissouba's camp. He was one of Lissouba's members and nothing happened to him during that time, even though these same people were looking for Lissouba supporters, such as himself, so that they could harm them. He never traveled by himself to Kinshasa. Asked how he could explain that no harm came to him, he answered that it was because he was under the protection of the Colonel. The Colonel was like a father and a father would not sacrifice his son. When he left the country, nothing happened to the Colonel.

When he arrived in Hong Kong, the war intensified in the Brazzaville. The Ninjas obtained the entire southern part of Brazzaville, so the war was generalized. Nothing happened to him while he traveled with the Colonel. The Colonel negotiated.

When he was in Zaire, he attended one meeting with the Ninjas and the Colonel. Those accompanying the Colonel were called the Cobras. In the Congo, the different relationships change.

He never attended meetings in Zaire with Cobras. He was with the Colonel and his men, whom he called Cobras. On Page 18 of his affidavit, he stated, "During one of our last trips to Kinshasa, the Colonel asked me to sit in on a meeting between Cobra and Ninja militiamen .... During that meeting, I realized that I had been used as a pawn..." He explains those he called "Cobras" were the men that accompanied the Colonel. At the meeting, the Ninjas were on one side, he was introduced and on the other side were Cobras. The negotiators were the Cobras, including himself. They would say, "See this one." He did not belong to the Cobras and the Ninjas. He is was in-between.

While he was going back and forth from Zaire, he fled from his job at the hotel, because his house was burned, he had to move around a lot with his family. The Colonel told him that his name was going around with the Cobras. Asked him what he thought was going to happen by going to meetings with the Cobras, he explains that his name was circulated in the other camp. His name was also circulated because they thought he was a bridge for those in exile and the Ninjas who were starting the new rebellion. This reason did not exist previously.

He repeatedly went with the Colonel to meet with these people, even though he was fearful, because the

Colonel reassured him. When he left for Hong Kong, he left Brazzaville at 3 a.m. His passport had his own name and picture. The Colonel had all of his documents. The Colonel took him directly to the Airport. The gates do not go directly to the airplane. He had no problems leaving, but he did not go through the main way of leaving. He did not fill out forms and do all of the formalities. He arrived at the airport with the Colonel.

On January 19, 2000, the Respondent continued, to be cross-examined as follows:

In November, 1998, he went to Hong Kong without a visa, but as a visitor. He got a stamp on his own passport for two weeks. He was able to leave the country with his Congolese passport. He did not apply for asylum from the Chinese government in Hong Kong, because they have good relationship with his country. Because of the information he had about human rights in China, he did not dare to ask them.

He went directly to the UNHCR, an office for refugees, part of the United Nations. He was able to get visas to remain in Hong Kong from the Chinese government, because the visas were two weeks at a time. The UNHCR granted him a letter which he gave to the Immigration Service. The UNHCR granted him a check of 2500 H.K. dollars every end of the month.

According to his visa, he could have stayed until December, 1999. He could not have stayed indefinitely in Hong Kong. Every time he went to Immigration they asked him what he was doing in Hong Kong. They said he was wasting time and had been there one year and was doing nothing. They always told him to wait to see what they could do for him. He could not stay in Hong Kong. He did not receive any answer on his refugee application.

During his stay in Hong Kong, he did not have any letters specifying any status. He only had the letter for the visas and the checks. As far as he knew, his asylum application was still pending when he left Hong Kong. They never answered him directly. He feared for the situation of his wife and daughter at that time. He asked the UNHCR what could be done for his wife and daughter. He could not stay in a place thinking that his wife and daughter were in danger.

Asked if he was safe, his answer was, "Can one sleep peacefully knowing that his family is in danger?" When the question was asked again, he responded, "Yes, I was alive. I was just waiting. I was not doing anything." Asked why he did not wait until his refugee application was approved, he responded that he thought of his wife and daughter who were in danger for one year. There were refugees there for three years doing nothing. He saw situation of others sent away for other reasons. That's why he was afraid and left.

He was never given an ultimatum to leave Hong Kong. He did not work in Hong Kong. He was given money to live there while his refugee application was being decided. He could just survive on that. He decided to leave Hong Kong in October 1999 because that was when he had the opportunity to come to the United States.

He paid for a plane ticket from Hong Kong to Equador which transited in the United States. Asked how he got the money for the plane ticket (from Hong Kong to Ecuador to the United States) if he was barely surviving, he explained that he was the Administrative Director of the Olympic Palace Hotel. One of his rights was an account at the Diner's Club. He had the right to manage that account.

When he arrived in Hong Kong, he realized he could not stay in Hong Kong, he called Diner's Club. He got a

check from Diner's Club to pay the plane ticket. He has to reimburse that Club to Jean Luc Mabonzot.

He paid the ticket from Hong Kong to Equador with transit to the United States. When he arrived in Alaska, he went to see the officer.

He hopes his wife and daughter are still alive in the Congo. He last communicated with his wife one week after his arrival in Hong Kong, through the Colonel. He had no other communication with her, due to the war in Brazzaville, and the phone communication was not working. He also testified that he last communicated with his wife in 1999. He has not spoken directly to his wife since November 1998, when he left for Hong Kong. He talked through the Colonel about his wife. He did not take his wife and child, because he did not have enough money.

Exhibit 2B, Page 35, there is an indication that he made some type of application to the US Embassy in Brazzaville in 1996. He explained that he wanted to visit the United States at that time. He wanted to see if he could purchase machines that made badges. When he went to ask for his visa, he was surprised because he did not even complete his file. They put a stamp on his passport and said it was not possible. They gave him a letter that he could appeal. When he left, he asked the officers outside. They did not even check the documents he presented and they denied it. During this time, he was the president of the subsection of UPAD. It was in March 1996 that he was the president there. The stamp was issued in December 1996. He wanted to buy the machines that made badges for the presidential election. It was a good business opportunity.

He went to the Australian Consulate General while he was in Hong Kong. He really wanted to leave due to his uncertain and unclear situation in Hong Kong. He went to

ask for a visa, and they told him that it was not possible. Since he went to the Canadian, New Zealand and Australian Consulate and they said no, through recommendation of a friend, he was told he could transit via the U.S. He just jumped at the opportunity.

He did not ask for asylum from the Australian Consulate; he asked for a visitor's visa. He did not ask for asylum because he wrote to the Canadian Consulate and they referred him to the UNHCR. He did not make an official request for asylum. He explained his situation and he was told that he had to go through the UNHCR Office. He went to the UNHCR first. He asked if it was possible for him to go to Canada considering his situation as it was. He told the Canadian Consulate that he was Congolese and ran away from his country due to his political activities. He asked them if it was possible for him to go to Canada. Canadian Consulate told him that he had to go through the UNHCR. That was why he only asked for a visitor's visa from the Australian Consulate and the New Zealand's Consulate. He really wanted to leave Hong Kong because of the situation he was in. He does not believe that he went to any other consulates in Hong Kong to ask for a visitor's visa.

On redirect examination, he testified as follows:

Before he left for the forest in 1997, he can not really say he could come and go without any problem whatsoever. But he would say that those on the side controlled by the Cobras were in a more uncertain situation than himself. On the side that he was, if they gave him two body guards, it was because his situation was not secure. As he recalls, one of the military guards who was placed in the hotel to watch them, said in his language, "Poor Larry, that will eat up the money of the Lissouba," because those guards who were guarding were the military's.

On questioning by the Court, he testified as follows:

He was employed until everyone started running away. There was no official notice terminating from his job. When he was living in Hong Kong he was not actually working for the hotel. When he asked for asylum from the United Nations, they gave him money for his support. He paid for a place to live, food, and clothing for himself. During the same time, he did not use the Diner's Card; he did not have a card.

He called Diner's Club and asked them if it was possible to have a check. He asked Diner's Club to issue him a check based on the fact that he was the administrative person in charge of the hotel. He was managing the account when he was in Brazzaville. When he arrived in Hong Kong, he explained to Diner's Club his situation. He explained the situation around June or July of 1999. He arrived in Hong Kong in November, 1998. Since he waited 7 to 8 months after he arrived in Hong Kong, Diner's Club must have verified his status. He believed he received the check in October, 1999. The Hotel never issued a letter of termination saying he was no longer an administrative officer there. The hotel was destroyed and the people ran away. He arrived in Hong Kong and called them. Since it took some time, he believed they checked it. He does not know how they checked it. He explained the situation in Brazzaville and he believes they checked the veracity of what he said. Asked whom they would have to check with, he responded, "I don't know."

On redirect, he testified as follows:

The money of the hotel is in the Diner's Club account. The money would normally go to Jean Luc. He was manager of the account. The account was created for the expatriates. He signed the checks that went to Diners.

Whenever there was any type of operation related to this account, he would sign it. Whenever they would request or sign the checks, it was his responsibility. As the financial director of the account, he would make a request that a check be issued for an account of the Hotel Olympic Palace. The purpose was to credit the accounts of UCB, BIDC, bank branches, to allow them to face their needs for credits. If he noticed that one account was low, then he would cover it. The account of Diners Club is in France and they did most of their operations in Brazzaville. There was no reason to leave dormant money in Europe.

There were others in Hong Kong who were sent away without reason. Mr. Pike of the UNHCR office sent them away.

CREDIBILITY AND ANALYSIS OF FACTS

a. Asylum and Withholding of Deportation

Respondent claims no incidents of individualized past persecution. However, he claims to fear future persecution if returned to the Congo due to his past political involvement and because he is an ethnic Lari. To establish eligibility for asylum based on a well-founded fear of persecution, an alien must demonstrate that his fear is both subjectively and objectively reasonable. Estrada-Posadas v. I.N.S., 924 F.2d 916, 918 (9th Cir. 1991).

Respondent's "credible testimony that he genuinely fears persecution" satisfies the subjective component. Acewicz v. I.N.S., 984 F.2d 1056, 1061 (9th Cir. 1993). The objective component "requires a showing by credible, direct and specific evidence in the record of facts that would support a reasonable fear that the petitioner faces persecution." Id. The Court finds that the respondent is not credible

and that he has failed to show facts that would support a reasonable fear of persecution.

The Court makes the following findings concerning the respondent's lack of credibility:

1. "The Colonel"

Respondent explains the most glaring inconsistencies in his asylum claim by the existence of his friend "the Colonel", a unidentified "leader of the Cobra forces". (The Cobras are the militia of Sassou-Nguesso's party, a party opposed to Lissouba. Respondent alleges that this faction will harm or kill him if he returns to Congo because Respondent is a Lissouba supporter.) In the Declaration that accompanies his Application for Asylum (Exhibit 2), Respondent identifies the Colonel as a good friend whom Respondent had once helped to find employment when Lissouba was president. At the merits hearing, Respondent testified that the Colonel was his "tonton", "a godfather" to whom Respondent was "like a son." Respondent relies upon "the Colonel" to explain the following occurrences, events which do not otherwise reconcile with his claim of past persecution:

(A) Respondent and family returned to and remained in Brazzaville unharmed

According to the Respondent, he and his family fled from Brazzaville to the forest in September or October of 1997 because "Sassou-Nguesso's militia began taking over the area where [he] was living." He stated that he was in danger because of his support of Lissouba and because of his employment at the Lissouba-owned hotel. However, Respondent testified that about a month later, the family returned to Brazzaville. Why did the family return to an area where Respondent felt was filled with danger? According to

the respondent, they did so because the Colonel "encouraged" them to do so.

When they returned to the city, Respondent and his family lived in his sister's house in the Kimpuomo section of Brazzaville. They apparently remained in Brazzaville until Respondent left for Hong Kong in November of 1998. During this entire year, Respondent asserted no incidents where he or any member of his family experienced any form of harassment, arrests, beatings, or death. This is despite the fact that the family was living (at least part of this time) at his sister's house where he could have easily been located.

(B) Respondent made continued trips across the border to Kinshasa

Respondent's passport indicates that he made as many as ten trips back and forth to Kinshasa, in the neighboring country of the Democratic Republic of Congo (formerly Zaire). The reasons for these many trips outside the country, according to the respondent, was that "the Colonel" was negotiating for his (Respondent's) "safety". The trips to Kinshasa were to help him "earn some points from them for amnesty." But during this time, almost a year in duration, Respondent and his family were living unmolested in the heart of the civil war zone. The respondent has failed to show why he needed "amnesty" or explain what danger necessitated such protection-again, he continued to live without harm in the capital city. While this story succeeds in explaining the numerous stamps on his passport during this year, it fails to do so credibly. How or why would a person in fear of his life constantly travel in and out of the country? Respondent's explanations of his frequent travel, including the "Colonel" and the countless "negotiation" trips to a neighboring country (it was never explained why these meetings took place outside of the country) seems at best fabricated and at worst false.

(C) Respondent repeatedly crossed the border without harm, despite it being guarded by his alleged persecutors

Respondent's passport, and the numerous trips to Kinshasa that the passport shows, present another issue: How was he able to travel safely back and forth across the country's border? The respondent testified that the border was guarded by Cobras, the militia of Sassou-Nguesso, the very group that wanted to kill him. He also testified that the Cobras were looking for Lissouba supporters, such as himself, so that they could harm them. But when Respondent was asked why he was never bothered during any of his trips across the border, Respondent answered that it was because he was under the protection of the Colonel, and the Colonel "protected him." Again, while the presence of "the Colonel" explains a gaping inconsistency in Respondent's story-that he was able to pass back and forth, unharmed, under the nose of mortal enemies-it fails to do so credibly.

(D) Respondent failed to identify a pivotal player in his story

According to the respondent, "the Colonel" was a colonel in Sassou-Nguesso's army and "a leader of the Cobra forces". And, as previously discussed, the Colonel plays a prominent role in Respondent's claim, providing a ready explanation for several substantial holes in Respondent's story: why he returned to Brazzaville even though his life was in danger there (the Colonel encouraged him), why he took countless unexplained trips outside his country to Kinshasa during the year before he left for Hong Kong (the Colonel was earning "amnesty" points for him), and why he was able to repeatedly cross the country's border unharmed despite it being guarded by the very group that allegedly wanted to kill him (the Colonel protected him). However, the respondent refused to give a name to this person. The

respondent adds as a coda to his story that the Colonel is now deceased.

Thus, despite the Colonel's overwhelming importance to the respondent's claim and the fact that he is no longer living, the respondent would not identify this very crucial person at his asylum hearing. He stated that he did not want to "betray his memory" by revealing the Colonel's name. But by refusing to identify his omnipotent benefactor, and further, maintaining that he is now dead, the respondent makes any verification of his story conveniently impossible. It also makes Respondent's story substantially less credible. Had the respondent's refusal been based on fear of retribution, to himself or the Colonel, some credibility may have been preserved. But Respondent's refusal to reveal a known and verifiable basis of his claim, and his putative reasons for so refusing, push an already doubtful claim to the point of disbelievability.

2. Funds Allegedly Received in Hong Kong

Another discrepancy in Respondent's story is his explanation of how he was able to afford a ticket from Hong Kong to Ecuador to Alaska while living as a refugee in Hong Kong. According to the respondent, he simply called Diner's Card and the company sent him money, based upon the fact that he used to manage "that account" when he worked at the Hotel Olympic Palace. At the time he requested the money (June or July of 1999), Respondent had not worked for the hotel for almost two years. He also testified that "[t]he hotel was destroyed." But according to Respondent, he simply placed a phone call to Diner's Card, and the company sent him enough money to pay a Pakistani man 1000 Hong Kong dollars (to "help me get the information I needed") and to buy a plane ticket from Hong Kong to South America to Alaska. Respondent was unable to offer any explanation for Diner's Card's generosity and trust, other than the fact that

almost two years ago he was the financial director of a now destroyed hotel that did business with the company. This is not credible.

Ironically, however, Respondent's explanation of this money is more problematic to his asylum claim if it *is* true: Respondent testified that he feared his wife and daughter were in danger in the Congo and that he hoped that they were still alive. He had earlier testified about the hardships the family experienced when they hid in the forest to escape the danger. In his Application for Asylum, he stated that he had sent them to live in the BaCongo quarter of Brazzaville and, while he was in Hong Kong, had learned that violence had erupted there. "Most of the people in BaCongo... were Lari. *I read that they were suffering immensely, butchered in the course of Cobra attacks.*" (emphasis added). Yet upon receiving this significant sum of money in Hong Kong, where he was safe and receiving living expenses from the UNHCR, Respondent chose not to evacuate his wife and daughter but to instead purchase himself a ticket to the United States.[3] Respondent's claims and respondent's actions are contrary and cannot be reconciled. This Court finds this to be indicative of the untruthfulness of both the respondent and his claim.

It should also be noted that Respondent had reached a place of safety in Hong Kong and was pursuing a refugee application through the UNHCR. Respondent testified that, as far as he knew, his asylum application was still pending when he left Hong Kong. He decided to leave Hong Kong in October 1999 because that is when he "had the opportunity to come to the United States." These actions are those of a

---

[3] Respondent had also testified that he did not originally bring his wife and daughter with him to Hong Kong because he "did not have enough money."

person seeking economic opportunity, not one fleeing persecution.

For these reasons, neither Respondent's testimony nor his claim that he will be tortured and persecuted is found to be credible. The Court finds that the discrepancies in his testimony are not minor but instead relate to the basis for the alleged fear of persecution and support an adverse credibility finding, de Leon-Barrios v. INS, 116 F.3d 391,393-94 (9th Cir. 1997). The respondent's testimony concerning "the Colonel" was inherently improbable, particularly in light of the fact that such testimony was used to explain several major inconsistencies in his claim. His testimony regarding the money he received in Hong Kong is also inherently improbable, and his use of that money (to buy himself a plane ticket to the U.S.) profoundly discredits his testimony that his wife and child were in grave danger in the Congo. The discrepancies are substantial and bear a legitimate nexus to the finding that the respondent does not have a credible fear of persecution in the Congo. Akinmade v. INS, 196 F.3d 951, 954 (9th Cir. 1999).

Even if the respondent were found to be credible, he has shown no incidents of past persecution nor has he shown any likelihood of future persecution on account of his claimed support of Lissouba or because he is a Lari. He has failed to show past persecution or a well-founded fear of persecution within the meaning of the Immigration and Nationality Act. I.N.S.v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). This Court does not deny that there is or has been a civil war occurring in Congo. The 1998 Country Report for the Congo indicates as much. But as the respondent testified, "It is a war between the militias and they kill each other and of course civilians are hurt." The war certainly presents a general danger to all persons in the Congo. But the situation does not support a claim of asylum, as it fails to satisfy any of

the five enumerated grounds of such relief. See § 101(a)(42)(A) of the Act; I.N.S.v Elias-Zacarias, 502 U.S. 478 (1992). See also Kotasz v. INS, 31 F.3d 847, 852 (9th Cir. 1994) ("the petitioner...must show that he is at particular risk - that his 'predicament is appreciably different from the dangers faced by [his] fellow citizens.'") Aliens fleeing general conditions of violence and upheaval in their countries do not qualify for asylum on that basis. See, e.g., Mendez-Efrain v. INS, 813 F.2d 279 (9th Cir. 1987); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.), cert. denied, 484 U.S. 826 (1987); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Rebollo-Jovel v. INS, 794 F.2d 441 (9th Cir. 1986); Lopez v. INS, 775 F.2d 1015 (9th Cir. 1985); Matter of T-, 20 I&N Dec. 571, 578 (BIA 1992).

b. Withholding Pursuant to the Convention Against Torture

The burden of proof is on the applicant for witholding of removal under the Torture Convention to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 CFR § 208.16(c)(2). Respondent has shown no previous detention or torture, despite living in Congo, in the same city, for almost a full year. Even after he left the country, he apparently was not sufficiently concerned about the possibility of torture to evacuate his wife and child. Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. 8 CFR § 208.18(a)(2). Respondent has not met his burden of proof that he would be subjected to extreme cruel and inhuman treatment if he were returned to Congo.

Conclusion

The Court finds that the respondent is not credible. He has further failed to show past persecution or a well-founded fear of persecution within the meaning of the Immigration and Nationality Act. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). He has failed to demonstrate an objective basis for his fear that he would be targeted for persecution due to any of the five enumerated grounds of asylum. See § 101(a)(42)(A) of the Act; I.N.S.v. Elias-Zacarias, 502 U.S. 478 (1992).

Because Respondent fails to satisfy the lower threshold for asylum, he necessarily fails to establish the "clear probability of persecution" required for withholding of removal. Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995).

The Court has considered withholding under the Torture Convention and finds that the respondent has not met his burden of proof. The respondent provided no evidence of past torture, any mental or physical intentionally inflicted severe pain or suffering that was sanctioned by public official or by a state actor. Based on the respondent's testimony and evidence offered, the Court finds that he has not shown that he is more likely than not to be tortured if he were to be removed to Congo.

The respondent declined to designate a country of removal. Therefore, this Court designates the Republic of Congo as the country of removal, since the respondent is a citizen of that country.

In light of the foregoing and after considering all of the testimony and documentary evidence of record, the following orders will be entered:

ORDERS

IT IS ORDERED that Respondent's application for asylum be denied.

IT IS FURTHER ORDERED that Respondent's application for withholding of deportation be denied.

IT IS FURTHER ORDERED that Respondent's application for withholding under the Convention Against Torture be denied.

IT IS FURTHER ORDERED that Respondent shall be removed to the Republic of Congo as charged in the Notice to Appear.

Dated this 15th date of February, 2000.

\s\ ANNA HO

ANNA HO
Immigration Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIAL BERTRAND NKOUNKOU, Petitioner, v. IMMIGRATION & NATURALIZATION SERVICE, Respondent.	NO. 00-71327 I&NS No. A76-598-579 ORDER

Before: RYMER, McKEOWN and GOULD, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing. Judge McKeown has voted to grant the petition for rehearing. The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIAL BERTRAND NKOUNKOU, Petitioner, v. IMMIGRATION & NATURALIZATION SERVICE, Respondent.	NO. 00-71327 I&NS No. A76-598-579 ORDER

Before: RYMER, McKEOWN and GOULD, Circuit Judges.

Nkounkou's motion to reconsider the court's order on the petition for rehearing and petition for rehearing en banc, to recall the mandate, and to stay removal is DENIED.

APPENDIX F

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1101 of Title 8 of the United States Code provides in pertinent part as follows:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a

pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * * * *

2. Section 1158 of Title 8 of the United States Code provides in pertinent part as follows:

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section * * *.

* * * * *

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with

the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

* * * * *

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

3. Section 1231 of Title 8 of the United States Code provides in pertinent part as follows:

§ 1231. Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened

in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

4. Section 1252 of Title 8 of the United States Code provides in pertinent part as follows:

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(b) Requirements for review of orders removal

With respect to review of an order of removal under section (a)(1) of this section, the following requirements apply:

* * * * *

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

* * * * *

5. Section 208.13 of Title 8 of the Code of Federal Regulations provides as follows:

§ 208.13 Establishing asylum eligibility

(a) *Burden of proof.* The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) *Eligibility.* The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) *Past persecution.* An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in

the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) *Discretionary referral or denial.* Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) *Burden of proof.* In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

* * * * *

§208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b) *Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof.* The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) *Past threat to life or freedom.* (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

* * * * *

Supreme Court, U.S.
FILED
MAY 5 2003
CLERK

No. 02-1131

In the Supreme Court of the United States

MARTIAL-BERTRAND NKOUNKOU, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under *INS* v. *Ventura*, 123 S. Ct. 353 (2002) (per curiam), the court of appeals erred when it denied a petition for review of a decision of the Board of Immigration Appeals, rather than granting the petition and remanding the case to the agency.

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In the Supreme Court of the United States

No. 02-1131

MARTIAL-BERTRAND NKOUNKOU, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter*, but is reprinted at 35 Fed. Appx. 680.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2002. A petition for rehearing was denied on October 30, 2002 (Pet. App. 44a; see Pet. 1). The petition for a writ of certiorari was filed on January 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA) defines the term "refugee" to mean an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien who is a refugee is eligible to be considered for asylum in the United States, provided that the alien is not disqualified from consideration because of past conduct such as participating in persecution or committing a particularly serious crime. 8 U.S.C. 1158(b)(1) and (2). The Attorney General is vested with discretion whether to grant asylum to an alien who satisfies the statutory definition of a refugee. 8 U.S.C. 1158(b)(1) and (2)(D), 1252(a)(4)(D).*

Congress has authorized the Attorney General to establish "requirements and procedures" governing asylum applications. 8 U.S.C. 1158(b)(1); see 8 U.S.C.

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* On March 1, 2003, certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service (INS), including the initial adjudication of asylum and refugee applications, were transferred to the Department of Homeland Security and assigned to its Bureau of Citizenship and Immigration Services. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2196 (codified at 6 U.S.C. 271(b)). The Attorney General, however, remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals (BIA). See 8 C.F.R. 1001 *et seq.* (Ch. V) (2003) (Justice Department implementing regulations as recodified after Homeland Security Act). Before the reorganization, the INS was named as the respondent in this case. The correct respondent was, and is, the Attorney General of the United States. See 8 U.S.C. 1252(b)(3)(A).

1158(b)(2)(C), (d)(1) and (d)(5)(B). Regulations issued pursuant to the Attorney General's authority place on the asylum applicant the burden of proving that he is a refugee. 8 C.F.R. 208.13(a). The regulations provide that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *Ibid.*; see *In re Dass*, 20 I. & N. Dec. 120, 124 (BIA 1989) ("[A]n alien's own testimony * * * can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his alleged fear.").

An asylum applicant who establishes that he suffered past persecution on account of a statutorily protected characteristic is rebuttably presumed to have a well-founded fear of future persecution if returned to his home country. 8 C.F.R. 208.13(b)(1). An applicant who has not established past persecution nevertheless can qualify as a refugee and be eligible for asylum if he otherwise proves, *inter alia*, that "[t]here is a reasonable possibility of suffering such persecution if [the applicant] were to return to [his home] country." 8 C.F.R. 208.13(b)(2)(i)(B).

When an alien is charged with being removable from the United States, the alien may have his asylum claim resolved in those proceedings. See generally 8 C.F.R. 208.2 through 208.5. Such a claim, and other issues relevant to whether the alien ultimately will be removed from the United States, are decided by an immigration judge (IJ) after a hearing. See 8 C.F.R. 208.13(b) and (c). The asylum decisions of IJs are appealable to the BIA, which, under the rules that applied to petitioner's case, had the power to conduct a *de novo* review of the record, to make its own findings of fact, and to determine independently the sufficiency of the evidence. See, *e.g.*, *Elnager* v. *INS*, 930 F.2d 784, 787 (9th Cir.

1991); see also 8 C.F.R. 3.1 (2002). A finding by the BIA that an asylum applicant failed to carry his burden of proof is reviewable, on judicial review of the final order of removal entered against the alien, by the federal court of appeals for the circuit in which the IJ sat. 8 U.S.C. 1252(b)(2).

Judicial review of BIA decisions, including those addressing asylum issues, is limited by statute. See 8 U.S.C. 1252(b)(4). Most important here, the court of appeals must "decide the petition [for review] only on the administrative record on which the order of removal is based," 8 U.S.C. 1252(b)(4)(A), and "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B).

b. The INA also provides for a related form of relief from removal, known as "withholding of removal." If the Attorney General determines that the "alien's life or freedom would be threatened" in the country to which the alien would be removed "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for this form of relief. 8 U.S.C. 1231(b)(3)(A). Unlike asylum, withholding of removal is mandatory rather than discretionary in nature. To be entitled to this relief from removal, however, the alien must not fall within one of the specified categories of criminal and other dangerous aliens. See 8 U.S.C. 1231(b)(3)(B) (excepted aliens). The alien must demonstrate a "clear probability of persecution" in order to receive withholding of removal. *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); see generally *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) (discussing relationship between asylum and withholding of removal); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999) (same). As with an applicant

for asylum, the applicant for withholding of removal bears the burden of proving his eligibility for relief, and the applicant's testimony may alone suffice to establish eligibility if it is credible. See 8 C.F.R. 208.16(b). BIA decisions on applications for withholding of removal are subject to judicial review under the same rules as BIA decisions on asylum applications. See 8 U.S.C. 1252.

2. Petitioner is a native and citizen of the Republic of Congo. Pet. App. 10a. On October 30, 1999, petitioner arrived in Anchorage, Alaska, on an airline flight from Hong Kong, without valid documents for entering the United States. The INS charged petitioner with being inadmissible to the United States under 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. App. 5a, 10a, 30a.

In administrative proceedings to remove petitioner from the United States, petitioner applied for asylum under 8 U.S.C. 1158 and withholding of removal to the Congo under 8 U.S.C. 1231(b)(3), and also sought withholding of removal under the Convention Against Torture, see 8 C.F.R. 208.16(c). Pet. App. 5a-6a. Petitioner did not claim that he had suffered persecution in the past. Instead, he alleged that he has a well-founded fear of future persecution in the Congo based upon his political opinion and his membership in the Lari tribe. *Id.* at 34a.

At a hearing before an IJ, petitioner testified that he was a political supporter and associate of former Congolese President Lissouba. In 1997, a military force known as the Cobras, led by a man named Sassou-Nguesso, deposed Lissouba, and Sassou-Nguesso became the President of the Republic of Congo. Pet. App. 19a-20a. Petitioner testified that after serving as a hotel manager in Brazzaville for several months after Lissouba's deposal, he fled from the Cobras and lived in rural villages. *Id.* at 20a-21a, 26a-27a. Petitioner

claimed that he later returned to the Brazzaville area under the protection of a certain colonel in the Cobras, whose name petitioner supposedly swore not to reveal. *Id.* at 22a. Petitioner testified that stamps in his passport showing crossings of the border with Zaire in 1997 and 1998—at a time when that border was controlled by the Cobras—were for trips that he took with and at the behest of "the Colonel." *Id.* at 23a, 24a, 27a, 36a-37a.

Petitioner testified that in 1998, he left Brazzaville for Hong Kong. Pet. App. 25a. He left his wife and daughter in the Congo. *Id.* at 30a. In October 1999, petitioner left Hong Kong for the United States. *Ibid.* Petitioner said that he paid for his airline ticket to the United States by drawing funds against a Diner's Club credit card account that he had managed when he worked as a hotel manager in Brazzaville. *Id.* at 30a-31a, 33a. Petitioner testified that the Colonel is now dead and that he would be tortured and killed by the Cobras if he returned to the Congo. *Id.* at 22a, 25a-26a.

3. An IJ denied petitioner's applications for asylum and withholding of removal and ordered him removed to the Republic of Congo. Pet. App. 43a. The IJ determined that petitioner did not provide credible testimony establishing a reasonable fear of persecution (*id.* at 34a-35a) because: (1) petitioner lived in the Cobra-controlled Brazzaville area for more than a year during 1997 and 1998 and was not harmed, see *id.* at 35a-36a; (2) petitioner made frequent trips to Zaire during that time, which he never adequately explained, see *id.* at 36a; (3) petitioner was not harmed during his border crossings, although the Cobras controlled the border, see *id.* at 37a; (4) petitioner refused to give the real name of "the Colonel," "despite the Colonel's overwhelming importance to [petitioner's] claim and the

fact that he is no longer living," *id.* at 38a; and (5) petitioner's story about obtaining money from Diner's Club was not credible and, if true, created a contradiction in petitioner's testimony because petitioner said that he did not bring his family to Hong Kong because he lacked money, *id.* at 38a-39a. The IJ determined that the discrepancies in petitioner's testimony were "substantial and bear a legitimate nexus to the finding that respondent does not have a credible fear of persecution in the Congo." *Id.* at 40a. In addition, the IJ stated that "[e]ven if [petitioner] were found to be credible, he has shown no incidents of past persecution nor has he shown any likelihood of future persecution on account of his claimed support of Lissouba or because he is a Lari." *Ibid.*; see *id.* at 42a.

4. The BIA dismissed petitioner's appeal. Pet. App. 5a-8a. It determined that the IJ "properly evaluated the facts presented by [petitioner] in support of his asylum claim and correctly concluded that he failed to establish either past persecution or a well-founded fear of persecution in the Republic of Congo on account of a ground enumerated in the [INA]." *Id.* at 6a; see *id.* at 7a-8a. In particular, the BIA determined that the IJ "had ample reasons to support her adverse credibility determination," including "the numerous inconsistencies in [petitioner's] testimony, the lack of evidence and absence of detail to support his account of events, and the inherent improbability of various elements of his claim." *Id.* at 6a-7a.

5. The Court of Appeals for the Ninth Circuit denied petitioner's ensuing petition for review. Pet. App. 1a-4a. The court stated that "[d]isregarding how [petitioner] bought his airplane ticket to this country and why he stayed for a year in Hong Kong, see *Akinmade* v. *INS*, 196 F.3d 951, 956 (9th Cir. 1999), the BIA's

ruling that [petitioner] did not demonstrate past persecution or a well-founded fear of persecution is nevertheless supported by substantial evidence." Pet. App. 1a-2a. The court specifically noted that petitioner "lived safely in the outskirts of Brazzaville during the height of civil unrest and was able to travel in and out of the country." *Id.* at 2a. The court continued that "[a]lthough [petitioner] submits that this was because he was under a Colonel's protection, the BIA was not compelled to accept his explanation as it was wholly unsubstantiated." *Ibid.* The court then listed several other portions of the record that contradicted petitioner's claim that he was threatened with persecution in the Republic of Congo. *Ibid.*

Judge McKeown dissented. In her view, the IJ's denial of petitioner's application for asylum was "predicated on an adverse credibility finding that cannot be sustained by the administrative record." Pet. App. 2a. Judge McKeown further expressed the view that materials in the administrative record, including country-conditions reports by the Department of State and Amnesty International, demonstrated that members of the Lari tribe and supporters of President Lissouba "were singled out by the ruling militia for persecution and thus faced dangers more severe than those faced by other Congo citizens." *Id.* at 3a.

ARGUMENT

The unpublished decision of the court of appeals in this case is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is not warranted.

1. a. Petitioner contends that the case should be remanded to the court of appeals for further consideration in light of *INS* v. *Ventura*, 123 S. Ct. 353 (2002) (per

curiam). See Pet. 4, 7. In *Ventura*, the Court held that the Ninth Circuit exceeded the permissible scope of its review when, having overturned a determination by the BIA that an alien had not established past persecution on account of a protected characteristic, the court itself determined the alien's eligibility for asylum and withholding of deportation, rather than remanding the case to the BIA for it to address those issues in the first instance. The Court stated that when a reviewing court sets aside an administrative decision, it generally "should remand [the] case to [the] agency for decision of a matter that statutes place primarily in agency hands." 123 S. Ct. at 355. The Court stressed that in a remand proceeding the BIA could "bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in so doing, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 355-356. Thus, the Court concluded, the Ninth Circuit "seriously disregarded the agency's legally-mandated role" when it made an initial determination about the alien's eligibility for relief, "without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise." *Id.* at 356.

Ventura also reaffirmed the rule that a reviewing court may not overturn the BIA's factual determinations merely because the evidence is "ambiguous" and might support a conclusion different from the agency's. *Ventura*, 123 S. Ct. at 356. Rather, the BIA's determination must be upheld if a reasonable fact-finder would not be *compelled* to disagree. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483-484 (1992); 8 U.S.C. 1252(b)(4)(B).

b. Petitioner's reliance on *Ventura* is entirely misplaced. This is not a case in which the court of appeals decided a question "without giving the BIA the opportunity to address the matter in the first instance." *Ventura*, 123 S. Ct. at 356. Rather, this case involves a routine, fact-bound application of the statutory rule that the BIA's "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

Here, the IJ, affirmed by the BIA, determined "that respondent is not credible and that he has failed to show facts that would support a reasonable fear of persecution." Pet. App. 34a-35a; see *id.* at 6a. The BIA determined that the IJ "properly evaluated the facts presented by the [petitioner]." *Id.* at 6a. The court of appeals cited the same set of facts about petitioner's experiences in the Congo that the IJ found significant, compare *id.* at 2a (court of appeals) with *id.* at 35a-38a, 40a-41a (IJ), and concluded that "the BIA's ruling that [petitioner] did not demonstrate past persecution or a well-founded fear of persecution is * * * supported by substantial evidence." *Id.* at 2a. The court of appeals therefore denied the petition for review of the BIA's decision because the record supported the determinations of the IJ and BIA. Unlike *Ventura*, this is not a case in which the court made a determination in the first instance about an issue the agency had not yet addressed.

2. The court of appeals did indicate that it disagreed with the IJ's determination that inconsistencies in petitioner's testimony about his Diner's Club transaction and his reasons for staying in Hong Kong for a year were materially related to his claims of persecution in the Congo. Pet. App. 1a-2a (citing *Akinmade* v. *INS*,

196 F.3d 951 (9th Cir. 1999)); see *id.* at 40a. But the court of appeals sustained the BIA's ultimate conclusion that petitioner failed to provide credible testimony establishing his eligibility for relief. In doing so, the court of appeals specifically upheld the BIA's refusal to credit petitioner's "wholly unsubstantiated" testimony about the Colonel and material events in the Congo. Pet. App. 2a.

Thus, even though the court of appeals did not approve the BIA's inferences from petitioner's testimony about his activities in Hong Kong, the court upheld the BIA's adverse credibility determination because it was supported by the record evidence. See Pet. App. 6a-7a (noting "numerous inconsistencies in the respondent's testimony, the lack of evidence and absence of detail to support his account of events, and the inherent improbability of various elements of his claim"). Accordingly, petitioner is mistaken when he asserts (Pet. 5) that the court of appeals affirmed the BIA's judgment "on an alternative theory not addressed by the BIA."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003